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No. 84-782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

On May 22, 1985 the Catawbas filed a Supplemental Brief replying to the Solicitor General's recommendation that this Court review and reverse the decision of the United States Court of Appeals for the Fourth Circuit in *Catawba Tribe of South Carolina, Inc. v. State of South Carolina*, 740 F.2d 305 (4th Cir. 1984) (*en banc*). This brief [1] is filed in response. No argument advanced by the

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[1] Because the Catawbas' supplemental brief was first received by any of the counsel for petitioners on May 23, 1985, and the petition has been scheduled for a conference on May 30, 1985, it has not been possible to prepare a printed version of this brief. Under an arrangement with the clerk, a copy of this brief for each Justice and three additional copies have been delivered to the clerk. A

Catawbas diminishes the compelling need for this Court to review now issues which have evenly split eight federal judges and which affect the rights of more than 27,000 innocent South Carolina landowners to unclouded possession of their homes and businesses.

DISCUSSION

I. This Court Should Now Determine Whether The Catawba Termination Act Made The South Carolina Statute Of Limitations Apply To This Claim.

The Solicitor General has concluded that the Court of Appeals majority was "clearly wrong" in concluding that the Catawba termination act, 25 U.S.C. §§ 931-938, did not make state law, including the South Carolina statute of limitations, applicable to this claim. *See* Amicus Brief of the United States at 16. The Catawbas have chosen not to address the merits of the United States' conclusion or the threshold question of whether the Catawba termination act made state law apply. Instead, they urge that the Court deny review on the grounds that: (1) a determination that state law applies might not finally resolve the Catawbas' claim; (2) it is somehow premature to determine the applicability of state law; and (3) if sufficient hardship is imposed upon innocent landowners by the pendency of this claim for as much as a decade, Congress will enact legislation bestowing largesse upon the Catawbas. Each assertion is demonstrably incorrect.

A. Application Of The South Carolina Statute Of Limitations Will Resolve The Catawbas' Claim Against All Landowners.

By arguing that the statute of limitations only bars the Catawbas' claim as to those persons who have occupied their property for the continuous ten-year period necessary to acquire title by adverse possession, the Catawbas confuse the statute of limitations with the doctrine of adverse possession. The South Carolina statute of limitations defeats an affirmative claim of title by barring the claimant's right to maintain an action, if it can be demonstrated that the claimant has not possessed the land at issue within ten years prior to the commencement of the action. *See* S.C. Code Ann. § 15-3-340;[2] *Haithcock v. Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923).[3] A defendant who defeats a plaintiff's claim of title by demonstrating that the plaintiff is barred by the statute of limitations has no further obligation to demonstrate that he has satisfied the requirements of adverse possession.[4]

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printed version will be prepared and submitted later in the week of May 27, 1985. [The printed version, hereby filed on May 30, 1985, is identical to the typewritten version except for this sentence in brackets.]

[2] S.C. Code Ann. § 15-3-340 provides:

> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.

By its own admission, the Catawbas were dispossessed of the land in issue approximately 140 years before suit was commenced.

[3] In *Haithcock* the Supreme Court of South Carolina has affirmed:

> [T]he law makes possession a very strong factor in the question of title to real estate, and it says if a man stays out of possession for 10 years, asserts no claim to a piece of property, does not occupy it by himself or by tenants, and lets that situation remain for 10 years the law says that it is too late for him to come in, that he is barred by the statute of limitations, and having slept on his rights for as long as 10 years he cannot come in afterwards and assert his rights.

115 S.E. at 729.

[4] The Catawbas' reliance upon *Adams v. Adams*, 220 S.C. 131, 66 S.E.2d 809 (1951) and other discussions of tacking is, accordingly, misplaced. *Adams* addressed only the issue of whether the defendant had acquired title by adverse possession. The Catawbas' concession that they have not possessed the land at issue for more than 140 years, together with the fact that the landowners cur-

This case was not commenced by 27,000 South Carolina landowners to affirmatively establish title to their land. Instead, it is the Catawbas who have challenged the validity of a voluntary 1840 transaction. Consequently, the ability of each landowner to establish title under adverse possession or other doctrines is irrelevant. The Catawbas' conceded failure to act on their claim while out of possession for more than ten years since the statute of limitations began to run now bars the Catawbas' claim as to any landowner.

B. Even If Some Portion Of The Catawbas' Claim Could Survive The Application Of South Carolina Law, No Reason Exists To Delay Removing The Cloud From The Title Of Thousands Of Innocent Landowners.

Counsel for the Catawbas "estimates" that if their construction of the South Carolina statute of limitations were adopted, the Catawbas "would retain [their] claims to up to 40% of the land in the claim area." Supplemental Brief at 4. The Catawbas' concession that even their improperly restrictive interpretation of South Carolina law would lift the cloud from 135 square miles of property held by more than 15,000 property owners is a compelling argument *in favor* of the grant of certiorari.

Professing their concern that "adoption of the United States' view would result in chaos," that the respondent "might well be forced to proceed separately against each individual landowner," and that "[m]any, if not all, of the benefits of class action litigation would be lost," the Catawbas ask that the Court decline to review a question of law on which eight judges have sharply, and equally, divided. *See* Supplemental Brief at 5. There are at least two sufficient answers to the Catawbas' arguments.

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rently have record title to their property, eliminates any need for the landowners to rely upon adverse possession to obtain title to their property.

First, if, as the United States and the petitioners contend, the Catawba termination act operates to bar the Catawbas' claim against all, or any, of the current landowners, the factual determinations of which the Catawbas now complain must be made eventually. It is senseless to subject all, or any, of those landowners to years of litigation and uncertainty before they receive the relief to which they are now entitled.

Second, the Catawbas can scarcely claim that their failure timely to assert their rights is a sufficient reason to burden thousands of landowners with expensive litigation. If there is any necessity to determine rights on an individual basis and that produces "chaos" for the Catawbas or impedes their ability to employ the "benefits of class action litigation," it is the Catawbas who must bear the burden of their failure to act timely. They cannot be permitted to shift that burden to innocent landowners against whom they have no right to proceed.

C. The Catawbas' Speculation That Congress Will Enact Settlement Legislation If They Are Permitted To Continue To Impose The Hardship Of This Litigation Upon The Citizens Of South Carolina Is Both Inappropriate And Unfounded.

The Catawbas have confirmed that their underlying purpose is to use this litigation to extract a remunerative settlement from Congress:

> If the petition is denied and the case proceeds to the merits, Congress will undoubtedly enact settlement litigation.

Supplemental Brief at 5. That argument is no more than a request that this Court delay the resolution of a substantial issue of federal law—which the Court of Appeals' resolved in a manner the United States has concluded is "clearly wrong"—so that the burden of the uncertainty and expense of litigation can be used to leverage a settle-

ment from Congress. But this Court's adoption of Fed. R. Civ. P. 11 and its recent amendments declared that the expense and burden of unfounded litigation may not properly be used to force a settlement. The merits of a case, not the burden of defending it, are the only proper basis for its settlement.

Equally important, however, is the fact that there is no basis whatever for the Catawbas' speculation that Congress will somehow rescue the landowners and bestow its largesse upon the Catawbas. Congress has shown no inclination to enact legislation to resolve claims such as those asserted by the Catawbas, and in those instances in which it has enacted legislation for other groups this Administration has vetoed the legislation. In light of the United States' determination that the Court of Appeals construction of the 1959 legislation was "clearly wrong," the likelihood of any successful legislative resolution is perhaps lower for the Catawbas than for any other group.

As the Solicitor General recognized, Congress acted in 1959. Amicus Brief at 20. A Congress which has acted, and an Administration which views the Congress as having acted is scarcely a prescription for further legislative action. Even if the Catawbas are able to visit substantial burdens upon the innocent landowners, or, as they would have it "proceed on the merits," they are unlikely to be able to achieve their goal of extracting "settlement legislation" from Congress.

II. The United States' Construction Of The Catawba Termination Act Is Unassailably Correct.

The Catawbas assert that the United States improperly has construed the unambiguous language of Sections 5 and 6 of the Catawba termination act because, in the Catawbas' view, the statutory language is insufficiently clear to terminate a reservation, and because the United States' construction of that statute would produce a result

inconsistent with the Catawbas' supposed wishes. Neither argument withstands analysis.

First, the Catawbas' reliance upon cases involving the termination or diminishment of a reservation is misplaced. *See* Supplemental Brief at 6. In 1959, no Catawba "reservation" existed and no area of land which could be fairly characterized as a "reservation" had existed for more than 120 years. At most, the Catawbas possessed a claim, subject to all available legal and equitable defenses,[5] to the return of land they had neither occupied nor possessed for more than 120 years. Moreover, as to the only land which could plausibly be described as a "reservation" in 1959—the land acquired administratively pursuant to the 1943 Memorandum of Understanding—the Catawbas candidly concede that "Congress did make plain its specific intent to terminate [it]." *See* Supplemental Brief at 6.[6]

Second, there is no inconsistency between the Catawbas' asserted desire that any claim they might have against the State of South Carolina not be affected by the Catawba termination act and the interpretation of that act provided by the Solicitor General. Even assuming that the Catawbas articulated a desire to preserve something other than a breach of contract claim against the state of South Carolina, it is clear that the Catawbas also desired to be fully subject to state law. The United States now only suggests that both these desires were honored

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[5] *County of Oneida v. Oneida Indian Nation*, No. 83-1065 (March 4, 1985).

[6] Indeed, it is the Catawbas' construction which produces absurd results. Their concession that Congress evidenced its intent to terminate the "smaller reservation" attributes to Congress an intent to terminate 3,400 acres from the center of the claim area, while at the same time preserving a claim to 225 square miles inhabited for more than one hundred years by tens of thousands of South Carolina citizens upon which, for example, sits the United States District Courthouse in which this action was pending.